IN THE HIGH COURT OF JHARKHAND, RANCHI

Cr.M.P. No. 1938 of 2016

Shamsher Alam @ Raja Babu .... Petitioner

-- Versus --

The State of Jharkhand .... Opposite Party

CORAM: HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioner :- Mr. A.K. Kashyap, Sr. Advocate
Mrs. Lina Shakti, Advocate

For the State :- Mr. V.S. Sahay, Advocate

C.A.V. On 15.02.2024 ***PRONOUNCED ON : 26/02/2024***

The petitioner has challenged the order dated 9.06.2016 passed by the learned Additional Sessions Judge-III, Garhwa in S.T. No.29/2015, arising out Garhwa P.S. Case No.512 of 2014 under section 302/ 34 of the IPC read with section 120B/34 IPC whereby the learned court has been pleased to allow the petition under section 311 Cr.P.C pending in the court learned Additional Sessions Judge-III, Garhwa.

2. The F.I.R has been registered alleging therein that on 18.08.2014 at about 8.00 a.m. the informant's husband Balindra Kumar Singh, who had gone to Ranka on Hero Honda Motorcycle bearing No.JH14A-2022 but did not return in the evening. The informant tried to contact him on his Mobile No.94311 36643 and 89368 30074 but both were switched off. The informant suspected some mishappening and started searching her husband with the help of neighbours but did not find any clue till 19.8.2014. Thereafter the informant filed written information at the police station on 19.08.2014. On 21.08.2014 the informant came to learn that dead body of her husband kept in gunny bag was dropped in the well in a lonely place situated in village Tildag. The dead body was identified by the informant. The informant has suspected that unknown person has committed murder of her husband.

3. Mr. A.K. Kashyap, the learned Senior counsel appearing on behalf of the petitioner submitted that charge sheet was submitted against the informant himself and the investigation against the petitioner was kept pending and against three other accused persons. He submitted that the petitioner has been falsely implicated in this case and there is no whisper against the petitioner. He further submits that charge has already been framed under section 302, 201, 120B and 34 I.P.C. P.W.1 and P.W.8 (Investigating Officer) have been examined and the evidence was closed and thereafter case was pending for final argument on 30.05.2016 and 03.06.2016 and the argument was also advanced. He submits that by impugned order dated 9.06.2016, the learned trial court while going through the case record found that material evidence was not brought on record by the prosecution and as such the learned trial court has started considering evidentiary value of the evidence brought on record by the prosecution and he formed an opinion that the examination of several witnesses including the remaining witnesses of the charge sheet and some other witnesses if needed and re-examination of I.O. is necessary. He submitted that when said opinion was formed without assigning any reason as to why re-examination of the I.O and remaining witnesses of the charge sheet and other witnesses are necessary. He submitted that P.W.1 was examined on 18.06.2015 and P.W.8 has been examined by the prosecution therefore further and that was completed after consuming one year and final argument was completed. He submitted that during that period the prosecution has not filed any application under section 311 Cr.P.C for calling upon the remaining witnesses. He submitted that the learned trial court has also not considered the necessity of exercising such power. He submitted that when the argument was advanced by the defence and when lacuna was found the said order was passed which is against the mandate of law. He submitted that it is well settled that to fill up the lacuna of the prosecution case that section is not required to be exercised. He submitted that the important parameter of consideration of object

under section 311 Cr.P.C, the learned court has not arrived at conclusion in absence of additional evidence, there would be failure of justice. He submitted that at fag end of the trial such power is exercised to fill up the lacuna and if the said order will be allowed to continue, the miscarriage of justice will be made against the petitioner. He relied in the case of "***State of Haryana v. Ram Mehar and Others", (2016) 8 SCC 762*** and referred to paragraph nos.21, 22, 24, 25, 36, 39, 40 and 41, which are quoted below:

> "**21.** *In Rattiram v. State of M.P. [Rattiram v. State of M.P., (2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] speaking on fair trial the Court opined that : (SCC p. 534, para 39)*
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> *"39. … Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism."*
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> *In the said case, it has further been held : (SCC pp. 541-42, paras 60-62 & 64)*
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> *"60. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the accused. The right of a victim has been given recognition in Mangal Singh v. Kishan Singh [Mangal Singh v. Kishan Singh, (2009) 17 SCC 303 : (2011) 1 SCC (Cri) 1019] wherein it has been observed thus : (SCC p. 307, para 14)*
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> *'14. … Any inordinate delay in conclusion of a criminal trial undoubtedly has a highly deleterious effect on the society generally, and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence.'*
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> *61. It is worth noting that the Constitution Bench in Iqbal Singh Marwah v. Meenakshi Marwah [Iqbal Singh Marwah v. Meenakshi Marwah, (2005) 4 SCC 370 : 2005 SCC (Cri) 1101] (SCC p. 387, para 24) though in a different context, had also observed that delay in the prosecution of a guilty person comes to his advantage as witnesses become reluctant to give evidence and the evidence gets lost.*
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> *62. We have referred to the aforesaid authorities to illumine and elucidate that the delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused (quaere a victim).*

Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing.

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64. Be it noted, one cannot afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the viewpoint of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice or failure of justice."

(emphasis in original)

22. *In J. Jayalalithaa v. State of Karnataka [J. Jayalalithaa v. State of Karnataka, (2014) 2 SCC 401 : (2014) 1 SCC (Cri) 824] it has been ruled that : (SCC p. 414, para 28)*

"28. Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general."

It has further been observed that : (SCC p. 414, para 28)

"28. … In all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings."

Further, the Court has observed : (SCC pp. 414-15, para 29)

"29. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily

requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. "No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State machinery and that is the raison d'être in prescribing the time-frame" for conclusion of the trial."

24. *The decisions of this Court when analysed appositely clearly convey that the concept of the fair trial is not in the realm of abstraction. It is not a vague idea. It is a concrete phenomenon. It is not rigid and there cannot be any straitjacket formula for applying the same. On occasions it has the necessary flexibility. Therefore, it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. Neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other. Once absolute predominance is recognised, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. There should be passion for doing justice but it must be commanded by reasons and not propelled by any kind of vague instigation. It would be dependent on the fact situation; established norms and recognised principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command compartmentalisation but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to the victim may play a pivotal role. The centripodal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fairness cannot be utilised to build castles in Spain or permitted to perceive a bright moon in a*

sunny afternoon. It cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such.

25. *From the aforesaid it may not be understood that it has been impliedly stated that the fair trial should not be kept on its own pedestal. It ought to remain in its desired height but as far as its applicability is concerned, the party invoking it has to establish with the support of established principles. Be it stated when the process of the court is abused in the name of fair trial at the drop of a hat, there is miscarriage of justice. And, justice, the queen of all virtues, sheds tears. That is not unthinkable and we have no hesitation in saying so.*

36. *Keeping in mind the principles stated in the aforesaid authorities the defensibility of the order passed by the High Court has to be tested. We have already reproduced the assertions made in the petition seeking recall of witnesses. We have, for obvious reasons, also reproduced certain passages from the trial court judgment. The grounds urged before the trial court fundamentally pertain to illness of the counsel who was engaged on behalf of the defence and his inability to put questions with regard to weapons mentioned in the FIR and the weapons that are referred to in the evidence of the witnesses. That apart, it has been urged that certain suggestions could not be given. The marrow of the grounds relates to the illness of the counsel. It needs to be stated that the learned trial Judge who had the occasion to observe the conduct of the witnesses and the proceedings in the trial, has clearly held that recalling of the witnesses was not necessary for just decision of the case. The High Court, as we notice, has referred to certain authorities and distinguished the decision in Shiv Kumar Yadav [State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402 : (2016) 1 SCC (Cri) 510] and Fatehsinh Mohansinh Chauhan [UT of Dadra & Nagar Haveli v. Fatehsinh Mohansinh Chauhan, (2006) 7 SCC 529 : (2006) 3 SCC (Cri) 300] . The High Court has opined that the court has to be magnanimous in permitting mistakes to be rectified, more so, when the prosecution was permitted to lead additional evidences by invoking the provisions under Section 311 CrPC. The High Court has also noticed that the accused persons are in prison and, therefore, it should be justified to allow the recall of witnesses.*

39. *There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be*

allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous.

40. *In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is, 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction.*

41. *It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the cross-examination could be restricted to certain aspects. In this regard, we are obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this*

stage could not have been allowed to be entertained."

4. Relying on the above judgment, Mr. Kashyap, the learned Senior counsel appearing for the petitioner submitted that the interest of victim and the accused are need to be balanced and the witnesses cannot be recalled endlessly on such ground. He further relied in the case of "***Mannan S.K. and Others v. State of West Bengal and Another",*** reported in ***2014 (3) JBCJ (SC) 240***, referred to paragraph no.10 of the said judgment, which is quoted below:

> *"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case.*
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> *The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re- examination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case.*
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> *It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."*

5. Relying on the above judgment Mr. Kashyap, the learned Senior counsel for the petitioner submitted that the court must form an opinion that for the just decision of the case recall/ re-examination of the witness is necessary which has to be exercised with circumspection and greater responsibility is cast

upon the courts for exercising such power under section 311 Cr.P.C. On these grounds, he submitted that the impugned order may kindly be set –aside.

6. Learned counsel appearing on behalf of the respondent State opposed the prayer on the ground that the learned court has been rightly pleased to exercise the power under section 311 Cr.P.C. He submitted that the petitioner is facing the trial under section 302 IPC and in view of the fact that for finding correct position the learned court has rightly exercised the power. He relied in the case of "***Varsha Garg v. State of Madhya Pradesh and Others",*** reported in ***2022 SCC Online SC 986*** and referred to paragraph nos.43, 44, 45, 47, 49, 51 and 52 of the said judgment which are quoted below:

> "***43.*** *Having dealt with the satisfaction of the requirements of Section 311, we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution's case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311.*
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> ***44.*** *In the decision in Zahira Habibullah Sheikh (5) v. State of Gujarat, which was more recently reiterated in Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd., the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:*
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> *"28. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section.* ***Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account****. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.****(emphasis supplied)***

45. *The right of the accused to a fair trial is constitutionally protected under Article 21. However, in Mina Lalita Baruwa (supra), while reiterating Rajendra Prasad (supra), the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In Rajendra Prasad (supra), the Court had held that:*

"8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. ***No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified****. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."*

(emphasis supplied)

47. *Finally, we also briefly deal with the objection of the respondents regarding the stage at which the application under Section 311 was filed. The respondents have placed reliance on Swapan Kumar (supra), a two judge Bench decision of this Court, to argue that the application should not be allowed as it has been made at a belated stage. The Court in Swapan Kumar (supra) observed:*

"11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this Section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

49. *The Court is vested with a broad and wholesome power, in terms of Section 311 of the CrPC, to summon and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar. This Court in Zahira Habibulla H. Sheikh (supra) while dealing with the prayers for adducing additional evidence under Section 391 CrPC at the appellate stage, along with a prayer for examination of witnesses under Section 311 CrPC explained the role of the court, in the following terms:*

"43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. ***They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency****. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."* ***(emphasis supplied)***

51. *The Court while reiterating the principle enunciated in Mohanlal Shamji Soni (supra) stressed upon the wide ambit of Section 311 which allows the power to be exercised at any stage and held that:*

"44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. : (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In Mohanlal v. Union of India this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, "any court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the section has expressed in the

> *widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code.* ***The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is*** *necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.*
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> ***(emphasis supplied)***
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> ***52.*** *While reiterating the decisions of this Court in Karnel Singh v. State of M.P., Paras Yadav v. State of Bihar, Ram Bihari Yadav v. State of Bihar and Amar Singh v. Balwinder Singh this Court held that the court may interfere even at the stage of appeal:*
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> *"64. It is no doubt true that the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorised witnesses, it is no acquittal in the eye of the law and no sanctity or credibility can be attached and given to the so-called findings. It seems to be nothing but a travesty of truth, fraud on the legal process and the resultant decisions of courts — coram non judis and non est. There is, therefore, every justification to call for interference in these appeals."*

7. Relying on the above judgment, the learned counsel for the respondent State submitted that in that case the High Court as well as the learned court has already dismissed the petition of the prosecution. He further submitted that this case may kindly be dismissed.

8. The learned court by order dated 09.06.2016 has been pleased to allow the re-examination of Dr. K. Sehgal, Dr. Ram Vinod Kumar and Dr. S.K. Raman, Medical Officers, Sadar Hospital, Garhwa and also Ratilal Oraon, Computer Operator, Technical Cell, Office of Superintendent of Police, Garhwa,

the Nodal Officer, Reliance Communication Limited, Maru Tower, Kanke Road, Ranchi and Nodal Officer, Airtel Bharti Telecommunication Ltd., B.P. Compound, Ranchi and other remaining witnesses of the charge sheet for re-examination at the end and any other witness if need be there. The learned court has formed an opinion in course of trial and found that material exhibits have been brought on record and the I.O has disclosed about confessional statement of the accused persons recorded by the police leading to recovery of certain articles belonging to the deceased on the confessional statement despite being referred to PW-8. has not been marked as exhibit. The call details report obtained during investigation by the police which were obtained by the computer operator after obtaining the same from the service provider, the call details have been marked exhibit but without such certificate. He also formed an opinion that in light of section 65(B) of Indian Evidence Act, the call details report without certificate is of no avail. The statement under section 164 Cr.P.C which was not brought on record which was found to be proper and necessary as the allegations against the wife who has murdered her husband and the informant is facing trial as an accused. The learned court has relied in the case of ***Zahira Habibullah H., Sheikh and Another v. State of Gujarat,*** reported in ***2004 AIR SC 3114, Iddar and Ors. V. Aabida and Another,*** reported in ***2007 0 AIR(SC) 3029*** as well as ***Raja Ram Prasad Yadav v. State of Bihar,*** reported in ***2013 AIR (SC) 3081*** and considering all these judgments, has been pleased form an opinion and thereafter has passed the order. The learned court has taken care of the things that duty is cast upon the court to arrive at truth by all lawful modes and one of such modes is examination of witnesses on its own accord and the best evidence must come on record which was found to be necessary by the learned court. The learned court has also taken care of the fact that said sections is not limited only for the benefit of the accused, however, a balance is required to be maintained in passing such order. By the impugned order the learned court has taken care of the things that the defence has every right to

cross examination and rebuttal of the evidence and record shall be posted on day-to-day basis for early conclusion of the trial. Thus, the learned court has also provided opportunity to the defence for cross examination.

9. The object underlying section 311 Cr.P.C is that there may not be failure of justice on account of mistakes of either party in bringing the valuable evidence on record or living ambiguity in the statements of witnesses examined from either side. The determinative factor is whether it is essential for just decision of the case signigate expression that occurs at any stage for enquiry or trial or other proceeding under this Code. However, the discretionary power conferred under section 311 Cr.P.C has to be exercised judiciously as it is always said wider the power greater is the necessity of caution while exercising judicious discretion.

10. For better appreciation of the matter, Section 311 Cr.P.C is quoted below:

> "***311. Power to summon material witness, or examine person present***.—*Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."*

11. Section 311 Cr.P.C. is in two parts; first part of this section speaks of discretionary authority, and second part, which is mandatory imposes an obligation on the court and this principle has been further reiterated in the case of "***Mannan S.K. and Others v. State of West Bengal and Another"(supra)*** and further in "***Ratanlal v. Prahlad Jat and Others"***, reported in ***(2017) 9 SCC 340*** and in "***Swapan Kumar Chatterjee v. Central Bureau of Investigation"*** reported in ***(2019) 14 SCC 328*** and in the case of **Swapan Kumar Chatterjee"(supra)** at paragraph nos. 10 and 11 of the said judgment, it has been held as under:

> "***10.*** *The first part of this section which is permissive gives purely discretionary authority to the criminal court*

> *and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.*
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> ***11.*** *It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."*

12. Thus, the court is required to proceed in a criminal case to discover the truth. Section 311 Cr.P.C is one of many such provisions which strengthens the arms of the court in its efforts to unearth the truth by procedural sanction by law. At the same time the discretionary power vested under section 311 Cr.P.C has to be exercised judiciously for strong and valid reason and with caution and circumspection to meet the ends of justice. Undisputedly, the facts of the present case is that wife is facing trial for murder of husband and evidence under section 164 Cr.P.C was not exhibited on the record and the call details were also required to be considered and the petitioner is facing the trial under section 302 of the IPC. In the case of ***"Rajendra Prasad v. Narcotics Cell through its Officer"*** reported in ***(1999) 6 SCC 110*** the Hon'ble Supreme Court in paragraph no.8 of the said judgment took note of the observation made in "***Mohanlal Shamji Sani v. Union of India", AIR (1991) SC 1346*** to the effect that while exercising

power under section 311 Cr.P.C the court shall not use such power for filling up the lacuna left by the prosecution. Paragraph no.8 of the said judgment is quoted below:

> *"8.Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."*

13. Thus, in the above case the Hon'ble Supreme Court has held that if proper evidence is not adduced and relevant matter was not brought on record due to any inadvertence, the court should be magnanimous in permitting such steps to be rectified. This part of excerpts of the said judgment of Hon'ble Supreme Court itself indicates that section 311 Cr.P.C includes power for examining the witnesses as well as admitting the relevant materials which are not brought on record. This view is also supported by section 91 of Cr.P.C which empowers the court to give direction for production of any document or other thing which is necessary or desirable for the purpose of investigation, enquiry or other proceeding under the Cr.P.C. It is the duty of the criminal courts to find out the truth in the interest of justice. Thus, the Court finds that learned court has taken every care in passing such order. In the case of "***State of Haryana v. Ram Mehar and Others" (supra)***, the issue was that 148 workers of Maruti Suzuki Limited armed with door beams and shockers, setting entire office of one of its factories on fire, resulting in General Manager, H.R of the company burnt alive. In that case the learned trial court has found that it was not explained as to what are the left out questions and how the questions already put to the said witnesses into the defence of the said accused and the learned trial court has been pleased to dismiss the said application and the Hon'ble High

Court has reversed that and in this background the Hon'ble Supreme Court has quashed the order of the High Court and restored the order of the learned Sessions Judge. However, in the case in hand, the learned Sessions Judge has given cogent reason of exercising such power under section 311 Cr.P.C and moreover, this is based on the para meters of section 311 Cr.P.C based on certain decision of the Hon'ble Supreme Court. Thus, the judgment is not helping the petitioner. In the case of "***Mannan S.K. and Others v. State of West Bengal and Another"* (supra),** relied by the learned Senior counsel for the petitioner, P.W.15 was examined on 18.02.2011 and he was re-examined on 17.05.2011 and after one month again on 16.06.2011 the prosecution moved application for recalling P.W.15 further and the High Court has reversed the learned trial court's order and the Hon'ble Supreme Court has reversed the High Court's judgment as the learned trial court has already allowed re-examination and further the application was filed and in view of that this judgment is also not helping the petitioner.

14. In view of the above facts, reasons and analysis, the Court finds that there is no illegality in the impugned order dated 09.06.2016, passed in S.T. No.29 of 2015 by learned Additional Sessions Judge-III, Garhwa and in view of that, Cr.M.P. No. 1938 of 2016 is dismissed.

15. The case is still pending before the learned court and there is stay operating and much time has been elapsed, and the learned court has already observed about expeditious trial in the impugned order, the trial will proceed on day-to-day basis.

16. Pending petition, if any, also stands disposed of accordingly.

(Sanjay Kumar Dwivedi, J.)

High Court of Jharkhand, at Ranchi
Dated 26/02/2024
A.F.R. */SI/*